U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

THEODORE HUANG,

COMPLAINANT,

v.

GREATWIDE DEDICATED TRANSPORT II, LLC,

RESPONDENT.

ARB CASE NO. 2019-0053

ALJ CASE NO. 2016-STA-00017

DATE: May 27, 2021

Appearances:

For the Complainant:
Christopher Staiti, Esq.; *Staiti & DiBlasio, LLP*; Millersville, Maryland

For the Respondent:
Renee L. Bowen, Esq.; *Franklin & Prokopik*; Baltimore, Maryland

Before: James D. McGinley, *Chief Administrative Law Judge*, Randel K. Johnson and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982 ("STAA"), as amended.[1] Theodore Huang ("Complainant") filed a whistleblower complaint against his former employer, Greatwide Dedicated Transport II, LLC ("Respondent" or "Greatwide"), alleging Respondent unlawfully terminated his employment in retaliation for reporting safety violations. The

[1] 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2020) (the STAA's implementing regulations).

Administrative Law Judge ("ALJ") issued a Decision and Order Awarding Damages ("D. & O."). Respondent appealed the ALJ's decision. We affirm.

BACKGROUND

Complainant worked as a truck driver for Greatwide from September 11, 2006, until his dismissal on May 31, 2012.[2] During his employment, he observed several employees had violated the limitation on hours of service for drivers.[3] In preparation for reporting it to his superiors, he retrieved documents from a lockbox pertaining to the drivers he suspected were violating the limitation and recorded management conversations.[4] On April 2, 2012, he wrote anonymous letters to Greatwide's vice president, Brian Scott, and regional director of safety, Aimee Price, alleging that employees were violating the hours of service limitation.[5] The employees were disciplined as a result of Complainant's reporting.[6] On May 14, 2012, Complainant acknowledged that he was the author of the letters.[7] Less than four days later (May 18, 2012), Complainant was suspended, and he was fired shortly thereafter on May 31, 2012.[8]

Complainant filed a complaint with the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA") on September 23, 2012, alleging Respondent violated the STAA by firing him in retaliation for reporting safety violations. On January 8, 2016, OSHA dismissed the complaint.[9]

Complainant subsequently requested a hearing before the Office of Administrative Law Judges ("OALJ"), which was conducted on September 19-20, 2017. The ALJ issued the D. & O. on March 27, 2019, in which he concluded that Complainant engaged in protected activities that contributed to his termination. The ALJ awarded Complainant $107,940.07 in back pay and $5,000 in emotional distress damages.[10]

---

2 D. & O. at 2-4.

3 *Id.*

4 *Id.*

5 *Id.* at 24.

6 *Id.* at 25.

7 *Id.* at 3.

8 *Id.*

9 *Id.* at 1-2.

10 *Id.* at 43.

Respondent filed a timely appeal to the Administrative Review Board ("ARB" or "Board"). Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Board to issue agency decisions in STAA cases.[11] The Board reviews an ALJ's factual determinations under the substantial evidence standard.[12] The Board reviews the ALJ's legal conclusions de novo.[13]

DISCUSSION

The STAA whistleblower statute provides that an employer may not discharge or otherwise retaliate against an employee because the employee engaged in STAA-protected activity.[14] To prevail on a STAA complaint, the complainant must prove by a preponderance of the evidence that: (1) he or she engaged in a protected activity; (2) the employer took an adverse employment action against them; and (3) the protected activity was a contributing factor to the adverse employment action.[15] If the complainant is unable to prove all three elements, the entire complaint fails.[16] If the complainant successfully meets this burden, the employer may avoid liability by demonstrating by clear and convincing evidence it would have taken the same adverse action in the absence of the protected activity.[17]

1. Delays

Respondent initially contends the complaint should be dismissed because delays by the Secretary and the ALJ caused it severe prejudice. Specifically, Respondent states that OSHA's determination was issued more than three years

---

[11] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[12] 29 C.F.R. § 1978.110(b).

[13] *Olson v. Hi-Valley Constr. Co.*, ARB No. 2003-0049, ALJ No. 2002-STA-00012, slip op. at 2 (ARB May 28, 2004) (citations omitted).

[14] 49 U.S.C. § 31105(a)(1); 29 C.F.R. §1978.102(a).

[15] 29 C.F.R. § 1978.109(a); *Estate of Ayres*, ARB Nos. 2018-0006, -0074, ALJ No. 2015-STA-00022, slip op. at 6 (ARB Nov. 18, 2020).

[16] *Coryell v. Arkansas Energy Servs., LLC*, ARB No. 2012-0033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (citation omitted).

[17] 29 C.F.R. § 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012).

after the complaint was filed and the ALJ's D. & O. was issued more than a year and a half after the hearing. Respondent further contends that Complainant contributed to the delay by requesting a hearing postponement, and by entering into a settlement agreement and later refusing to sign it. Respondent also contends that, because of the delay, witnesses' memories faded, and it was unable to locate other witnesses. Respondent further adds that during this period of time, it had changes in personnel and document management systems that affected its ability to respond to this claim.

The STAA states that the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the parties in writing no later than 60 days after receiving a complaint.[18] Requested hearings "shall be conducted expeditiously" and the Secretary "shall issue a final order … [n]ot later than 120 days after the end of the hearing."[19] However, failure to meet these requirements does not invalidate any action by the Secretary and "statutory time limits for agency action are usually deemed directory."[20] Further, a decision issued beyond the deadline is not unreasonable where the ALJ considered "sharply conflicting testimony, and the result was a lengthy and well-reasoned decision."[21]

The ALJ's D. & O. was a detailed, 45-page decision in which the ALJ analyzed the sharply conflicting testimony of Complainant, Mr. Scott, Ms. Price, and Richard Burnett, Greatwide's regional vice president. Thus, the ALJ issuing the D. & O. more than 120 days after the hearing is not unreasonable.

Respondent cites to *Todd Shipyards Corp. v. Sec'y of Labor*, arguing that employers can avail themselves of the remedies for promptness violations where the Secretary's failure to conduct an investigation and issue an order with reasonable promptness causes prejudice.[22] However, *Todd Shipyards Corp.* involved citations by the DOL for OSHA violations in shipyards.[23] The complaint at issue here was filed by an employee against his former employer, and thus it does not apply.

Even if Respondent could avail themselves of the remedies for promptness violations described in *Todd Shipyards Corp.*, Respondent has not shown that it was prejudiced. The ALJ's award for back pay was limited from May 2012 through

---

18 49 U.S.C. § 31105(b)(2)(A).

19 49 U.S.C. § 31105(b)(2)(C).

20 *Trans Fleet Enterprises, Inc. v. Boone*, 987 F.2d 1000, 1005 (4th Cir. 1992).

21 *Id.*

22 Resp. Br. at 27 (citing to *Todd Shipyards Corp. v. Sec'y of Labor,* 566 F.2d 1327, 1330 (9th Cir. 1977)).

23 *Id.*

2014 and was not affected by the delay.[24] In addition, Complainant filed his complaint with OSHA on September 23, 2012, three months after he was fired. This provided Respondent with more than sufficient notice that it should have immediately taken steps to preserve any evidence that might have been relevant to Respondent's termination decision. Although Respondent argues it was unable to locate witnesses, three of its witnesses who did testify were central to Complainant's reporting and termination. Those witnesses include Complainant's manager and the two recipients of his anonymous letters. Testimony from Mr. Burnett also indicates one employee who violated the hours of service limitation was employed by Greatwide at the time of the hearing yet did not testify.[25]

Respondent's other timeliness arguments are not supported by the record. First, Complainant did not cause unreasonable delays. He timely filed both his complaint with OSHA and request for a hearing before OALJ. Complainant also requested the first postponement because he mistakenly believed he had retained an attorney who had a scheduling conflict. Second, although Respondent correctly states that Complainant requested the first hearing postponement, Respondent requested the second postponement. Finally, substantial evidence supports the ALJ's finding that the parties did not enter into a settlement agreement.

Therefore, we conclude Respondent has not established that the complaint should be dismissed because of delays.

2. Initial Disclosures

Respondent contends the ALJ erred in considering claims and evidence that Complainant did not list in his initial disclosures, but instead were later introduced at the evidentiary hearing. Respondent states that, as a result, it was unable to properly evaluate the claims and prepare a defense. The ALJ determined the error was harmless because Complainant was *pro se* when initial disclosures were due, and Respondent already had a calculation of damages, Complainant's tax returns, and "plenty of time to prepare."[26]

When a party fails to make its initial disclosures, "the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or is harmless."[27]

---

[24] D. & O. at 38-40.

[25] Tr. at 206.

[26] *Id.* at 10-15.

[27] 29 C.F.R. § 18.57(c).

Here, Complainant filed his disclosures on May 5, 2017, which included his claims, a list of potential witnesses, calculation of damages, and tax statements. The discovery deadline was August 10, 2017 and the hearing was on September 19-20, 2017. This provided Respondent with three months to conduct discovery and four and a half months to prepare a defense. As the ALJ correctly observed, Respondent had considerable time to prepare a defense. In addition, as the ALJ noted, Complainant was *pro se* when his initial disclosures were due, and he did not obtain counsel until after the deadline.[28] Therefore, we affirm the ALJ's determination that Complainant's failure to timely make his initial disclosures was harmless.

3. Protected Activity

A complainant may engage in protected activity by making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . . ."[29] In addition, "a complainant must show that he reasonably believed he was complaining about the existence of a safety violation."[30] Internal complaints to management conveying a reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation are protected.[31]

The ALJ determined Complainant engaged in protected activity when he wrote letters to Greatwide's vice president and the regional director of safety, removed documents from the lockbox and copied them, and recorded a meeting.

On appeal, Respondent contends the ALJ erred in finding the recording was protected activity for several reasons. First, Respondent contends the recording violates Federal and the State of Maryland's wiretap acts. Both Federal and Maryland wiretap law require a reasonable expectation of privacy in order for a recording to be illegal.[32] However, as the ALJ correctly opined, there is insufficient

---

[28] In addition, we note Respondent's contention it was prejudiced because it did not have sufficient time to prepare a defense is inconsistent with Respondent's previous argument that it was prejudiced because too much time passed.

[29] 49 U.S.C. § 31105(a)(1)(A).

[30] *Ulrich v. Swift Transp. Corp.*, ARB No. 2011-0016, ALJ No. 2010-STA-00041, slip op. at 4 (Arb Mar. 27, 2012).

[31] *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009).

[32] 18 U.S.C.A. § 2510(2) (a speaker must "exhibit[] an expectation that such communication is not subject to interception under circumstances justifying such expectation"); Md. Code Ann., Cts. & Jud. Proc.§ 10-401(13)(i) ("any conversation or words spoken to or by any person in private conversation"); *Fearnow v. Chesapeake & Potomac Tel. Co. of MD,* 104 Md. App. 1, 33,655 A.2d 1, 16 (1995); *U.S. v. Castellanos,* 716 F.3d 828, 832 (2013); *U.S. v. Graham,* 824 F.3d 421, 425 (4th Cir. 2016) (en banc).

evidence in the record about the nature of the conversation and how it was recorded to determine whether Complainant's recording was illegal.

Second, Respondent contends that indiscriminate recording of all oral communications is not protected, relying on *Hoffman v. Netjets Aviation, Inc.*[33] We disagree. In *Hoffman*, the Board determined that the complainant's recording was not protected because employees were prohibited from recording matters related to the employer's business, and because the complainant recorded approximately 750 conversations over a year and eight months.[34] Conversely, the Board has held that making selective recordings to gather evidence is a protected activity.[35] Here, Complainant recorded only a few hours during a single meeting at a time that he knew dispatchers reviewed drivers' hours in order to capture driving violations. Further, Respondent had no written policy either prohibiting recordings, or that product type, delivery locations, or assigned routes were confidential.[36] Thus, the facts here are distinguishable from those in *Hoffman*.

Third, Respondent contends that only recordings relating to safety matters are protected, and that here, only a few minutes of the recording relates to safety. Respondent also contends that Complainant did not record the dispatchers' meeting to capture safety violations, but rather did so to document which Nordstrom stores needed products. However, this contention mischaracterizes Complainant's testimony. Complaint testified he recorded this meeting because, based on his prior observations, he knew when the dispatchers would discuss the Nordstrom account.[37]

Thus, the ALJ correctly determined that Complainant engaged in protected activity when he recorded the meeting.

Respondent also contends the ALJ erred in finding that removing and copying documents from the lockbox was protected activity. Specifically, Respondent contends that removing and copying confidential information violates Greatwide's company policy, and is not protected regardless of whether it supports a complaint, citing to *BSP Trans. Inc. v. Dep't of Labor*.[38] However, the complainant in *BSP*

---

[33] *Hoffman*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 3 (ARB Mar. 24, 2011).

[34] *Id.*

[35] *Mosbaugh v. Georgia Power Co.*, Nos. 1991-ERA-00001 and -00011, slip op. at 7-8 (Sec'y Nov. 20, 1995).

[36] Tr. at 97-98, 107-08, 169-70.

[37] *Id.* at 169.

[38] *BSP Trans., Inc. v. U.S. Dep't of Labor,* 160 F.3d 38, 49 (1st Cir. 1998).

Trans. Inc. never submitted a complaint alleging STAA violations.[39] In contrast, here, Complainant used the information he removed and copied to support his complaint. Further, as the ALJ correctly observed, Complainant never provided these copies to anyone outside of Greatwide, and, even if he did, the handbook's policy on confidential information does not include the information found on these documents.[40] Thus, the ALJ correctly determined Complainant engaged in protected activity when he removed and copied documents pertaining to timekeeping.

Therefore, we affirm the ALJ's finding that Complainant engaged in protected activity when he sent letters reporting safety violations, removed and copied documents, and recorded the dispatchers' meeting.

4. Contributing Factor

A complainant must prove his STAA-protected activity was a contributing factor to the adverse employment action.[41] A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."[42]

The ALJ determined that Complainant's protected activities contributed to his firing based on the temporal proximity between when he was revealed to be the author of the anonymous letters, and when he was fired in conjunction with Respondent's knowledge that he wrote the letters.

Respondent contends Complainant's protected activity was not a contributing factor to his firing, but rather that he was fired for violating company policy, which includes removing and copying confidential information and recording the dispatchers' meeting. Respondent contends that STAA does not authorize the Secretary to police and undercut its policies and disciplinary practices.

A contributing factor may be established by direct or circumstantial evidence, including temporal proximity.[43] The closer the temporal proximity is, the stronger the inference of a causal connection, which can establish retaliatory intent.[44]

---

39 *Id.*

40 RX D, CX G.

41 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a).

42 *Beatty v. Inman Trucking Mgmt.*, ARB No. 2013-0039*,* ALJ No. 2008-STA-00020, slip op. at 8 (ARB May 13, 2014).

43 *Cheeley v. Iesi Progressive Waste Sols.*, ARB No. 2019-0019, ALJ No. 2017-STA-00032 (ARB Dec, 19, 2019).

44 *Beatty v. Inman Trucking Mgmt.*, ARB Nos. 2015-0085, -0086*,* ALJ No. 2015-STA-00010, slip op. at 8-9 (ARB Dec. 8, 2017).

Temporal proximity coupled with employer knowledge may be sufficient to establish the contributing factor element.[45] However, while "temporal proximity may support an inference of retaliation, it is not necessarily dispositive." [46] Rather, temporal proximity is "'one piece of evidence for the trier of fact to weight in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'"[47]

Although the record substantially supports the ALJ's finding of temporal proximity plus Respondent's knowledge of the protected activity, standing alone, this type of coupling evidence is not conclusive in determining whether Complainant's protected activity contributed to his firing. In this case, however, there are other facts that support a finding Complainant's protected activity was a contributing factor to being fired. For example, the ALJ determined Complainant engaged in protected activity when he removed and copied documents and recorded the dispatchers' meeting. As previously discussed, we have found that these findings of fact are supported by substantial evidence in the record. In addition, Respondent admits that Complainant was fired, in part, because he removed and copied documents and recorded employee conversations.[48] Because a contributing factor is any factor that affects the outcome of an adverse action in any way, we conclude that Complainant's protected activity contributed to his firing.

5. Affirmative Defense

A. *Witness Testimony*

An employer may avoid liability by demonstrating by clear and convincing evidence it would have taken the same adverse action in the absence of the protected activity.[49] Under the clear and convincing burden of proof, the employer

---

45 *Pattenaude v. TRI-AM Transp., LLC*, ARB No. 2015-0007, ALJ No. 2013-STA-00037 (ARB Jan. 12, 2017), citing *Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); and *Riess v. Nucor Corp.*, ARB No. 2008-0137, ALJ No. 2008-STA-00011, slip op. at 5 (ARB Nov. 30, 2010).

46 *Jackson v. Arrow Critical Supply Sols., Inc.*, ARB No. 2008-0109, ALJ No. 2007-STA-00042, slip op. at 7 n.5 (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 6 (ARB May 26, 2010)); *see Spelson v. United Express Sys. and PML*, ARB No. 2009-0063, ALJ No. 2008-STA-00039 (ARB Feb. 23, 2011); *Warren v. Custom Organics*, ARB No. 2010-0092, ALJ No. 2009-STA-00030 (ARB Feb. 29, 2012).

47 *Id.*

48 Resp. Br. at 45.

49 29 C.F.R. § 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012).

must demonstrate that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity.[50]

The ALJ determined Respondent did not establish an affirmative defense. The ALJ opined that Respondent did not present a consistent theory for why Complainant was fired. The ALJ concluded that Respondent failed to establish it would have fired Complainant for Respondent's purported reasons.

We find the ALJ's conclusion that Respondent did not present a consistent theory for why Complainant was fired is supported by substantial evidence in the record. Most importantly, Complainant's termination letter did not state a specific reason why he was fired.[51] In addition, Respondent's witnesses contradicted each other regarding the reason why he was fired.[52] Further, Respondent contends that Complainant was fired for detaching and abandoning a Nordstrom trailer on a public street in Manhattan that was not on the store's property.[53] However, Respondent did not include this explanation until the hearing.[54] Respondent also contends these inconsistencies occurred because the hearing was five and a half years after Complainant was fired.[55] However, as previously discussed, Respondent knew about Complaint's claim shortly after Complainant was fired, and, therefore, had more than sufficient notice to preserve any evidence relevant to the reason(s) for terminating Complaint's employment.

---

[50] Under the clear and convincing burden of proof, the employer must demonstrate that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52-53, 57 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (citation omitted)).

[51] RX L.

[52] Ms. Price testified that she was involved in the decision to fire Complainant and that he was fired for damaging the lockbox and for detaching and leaving the trailer, but she did not testify that Complainant was also fired, in part, for recording conversations. Tr. at 244. Mr. Scott testified that Complainant was fired for recording conversations, damaging the lockbox, removing paperwork from the lockbox, and detaching and leaving the trailer. *Id.* at 337-41. Respondent's Renewed Motion for Summary Decision also included an affidavit from Jeffrey Stupp, Greatwide's Vice President and General Counsel, who stated that Complainant was fired for breaking into the lockbox, stealing its contents, and recording management conversations and not due to any other reason, such as detaching and leaving the trailer.

[53] Resp. Br. at 19.

[54] RX L, Resp. Renewed Motion for Summary Decision.

[55] Resp. Br. at 18.

Respondent also contends that another employee reported hours of service violations but did not violate company policy and, yet, is still employed at Greatwide. However, it is not clear from the record that any actions were taken in response to that complaint. In contrast, several Greatwide employees were disciplined in response to Complainant's reporting.[56] Further, Ms. Price testified that she was not aware of any other employees who made similar allegations at Complainant's terminal prior to receiving his letter.[57] Thus, Complainant was not similarly situated to the other employee who reported violations.

B. Other Grounds for Terminating Complainant's Employment

Respondent further contends that Complainant was also fired for violating company policy, which includes damaging the lockbox, removing and copying documents, recording his superiors' communications, and detaching and abandoning a trailer.

i. Damaging the Lockbox

We agree with the ALJ's conclusion that Respondent failed to establish by clear and convincing evidence that it would have fired Complainant for damaging the lockbox. Evidence in the record about whether the lockbox was damaged is inconsistent. Although Respondent claims that Complainant admitted to damaging the lockbox, the record does not include any credible evidence to support such an admission.[58] Further, Respondent relies upon the testimony from Mr. Scott and Ms. Price that is conflicting and unclear.[59] Also, the photographs of the lockbox do not illustrate the lockbox had been damaged.[60] In addition, Mr. Burnett testified that the security tapes on the day the lockbox was damaged do not provide any evidence about how, or if, the lockbox was damaged (or by whom) because the security video tapes had been taped over.[61] The ALJ also correctly found that Respondent's witnesses contradicted each other on key points regarding where the purported

---

56 D. & O. at 25, RX N, RX M, RX O.

57 Tr. at 268.

58 Resp. Br. at 39-40.

59 Mr. Scott initially testified that Complainant admitted to damaging the lockbox. Tr. at 337. However, Mr. Scott later testified that Complainant told him he only broke into the lockbox. *Id.* at 345. But later during the hearing, Mr. Scott testified that he could not remember whether Complainant said he damaged the box. *Id.* Similarly, Ms. Price initially testified that Complainant admitted to damaging the box, but later clarified she was referring to the picture Complainant included with his letter that showed the slit on the box was wider than it had been. *Id.* at 250, 279.

60 RX E, CX I, CX J.

61 Tr. at 194.

damage was located on the lockbox and to what extent the lockbox was damaged.[62] In addition, the testimony of Respondent's witnesses contradicted Complainant's testimony that he not only did not damage the lockbox, but he also had retrieved documents from the box on multiple occasions.[63] We see no compelling reason to overturn the ALJ's credibility determination regarding the conflicting testimony. Thus, we conclude the ALJ correctly found that Respondent did not establish by clear and convincing evidence that it would have fired Complainant because he damaged the lockbox.

ii. Detaching and Abandoning a Trailer

The record also supports the ALJ's conclusion that Respondent failed to establish by clear and convincing evidence that it would have fired Complainant for detaching and abandoning a trailer. As the ALJ observed, Respondent did not mention this event as a basis for Complainant's termination before the hearing.[64] In addition, as the ALJ also pointed out, the circumstances surrounding the trailer are unclear. Respondent was unable to produce a purported email from Nordstrom about the matter.[65] Further, it is not clear under company policy that Complainant would have been fired for abandoning the trailer under the circumstances. Greatwide's policy handbook states drivers must take daily meal breaks, and the handbook contains no written policy about detaching and leaving a trailer.[66] Indeed, Ms. Price even acknowledged that drivers are permitted to leave their trucks to take meal breaks.[67] Thus, we conclude the record supports the ALJ's finding that Respondent did not establish by clear and convincing evidence that Complainant would have been fired for detaching and leaving a trailer.

iii. Recording Conversations

The record also supports the ALJ's finding that recording conversations and removing and copying documents did not violate Respondent's policies. Specifically, Respondent contends these activities violated their confidentiality policy. However, as the ALJ observed, only managers were required to sign a confidentiality policy.

---

62 Mr. Burnett testified that the lockbox looked like someone had taken a hammer and punched a hole in the side of the lid the size of a softball and near the slit. Tr. at 191-92. Ms. Price testified that the damage to the lockbox was that the slit on the box was wider than it previously had been. *Id.* at 279. Mr. Scott testified that he could not recall the specific damage to the lockbox. *Id.* at 336-37.

63 Tr. at 38-40.

64 ALJX 7, RX L.

65 Tr. at 350.

66 CX G, RX D.

67 Tr. at 301.

As Complainant was not a manager, he did not sign a confidentiality agreement. In addition, there is no evidence that Complainant disclosed the recording or the documents he copied to anyone outside of Greatwide. Further, even if Complainant violated the confidentiality policy, the handbook is unclear about what discipline would follow such a violation. Respondent also contends that removing and copying timekeeping records constitutes "theft or inappropriate removal or possession" of Greatwide's property.[68] However, Complainant copied the records and returned the original documents to the lockbox. Further, even if temporarily removing the documents constituted an inappropriate removal of property, the handbook includes a range of disciplinary actions.[69]

In sum, we affirm the ALJ's conclusion that Respondent has not established by clear and convincing evidence it would have fired Complainant absent his protected activity.

CONCLUSION

The ALJ's conclusion that Huang engaged in STAA-protected activity and was discharged from employment is supported by substantial evidence in the record. The ALJ's conclusion that Complainant's protected activity contributed to his discharge is also supported by substantial evidence. Finally, we conclude Greatwide failed to show by clear and convincing evidence that it would have discharged Huang in the absence of his protected activity. Accordingly, we **AFFIRM** the ALJ's D. & O. ordering Greatwide to pay Huang $107,940.07 in back pay and $5,000.00 in emotional distress damages.

To recover reasonable attorney's fees and litigation costs incurred in responding to this appeal before the Board, Huang must file a sufficiently supported petition for such costs and fees within 30 days after receiving this Decision and Order, with simultaneous service on opposing counsel. 49 U.S.C. 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.110(d). Thereafter, Greatwide shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

---

[68] Resp. Br. at 8.

[69] CX G, RX D.